United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-2039

(41778)

To be argued by
ELLEN KRAMER SAWYER

United States Court of Appeals

FOR THE SECOND CIRCUIT

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,

Plaintiffs-Appellants,

vs.

BETTY FURNESS, Commissioner,
Department of Consumer Affairs, City of New York,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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Preliminary Statement

In this suit for a declaratory judgment on the constitutionality of Chapter 36, Title A, §833-16.0 of the Administrative Code of the City of New York (hereafter §833-16.0 or local ordinance) and for a permanent injunction restraining the defendant Commissioner* from enforcing the provision against retailers of plaintiffs' wheat flours, plaintiffs appeal from two orders of the United States District Court for the Southern District of New York (MOTLEY, J.).

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* The original defendant herein, sued only in her official capacity, was Commissioner Betty Furness. As used herein "defendant" means either Commissioner Furness or the present Commissioner, depending on the period in question.

The first order entered March 8, 1974, which denied plaintiffs' motion for a preliminary injunction and granted, in part, defendant's motion for summary judgment, was based on the Court's ruling that the ordinance, as applied, neither violates the Due Process Clause of the federal constitution nor is preempted by the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §301 *et seq.*, or the Fair Packaging and Labeling Act, 15 U.S.C. §1431 *et seq.* The second order, entered July 3, 1974, which denied plaintiffs' motion for a permanent injunction and granted defendant's motion to dismiss the complaint, was based upon the Court's ruling, after a trial limited to the one remaining issue, that the City ordinance does not improperly burden interstate commerce.*

Issues Involved

The Administrative Code of the City of New York provides that it is unlawful, in selling or offering for sale any article of merchandise, to misrepresent that commodity's true weight. Under this ordinance, several retailers of wheat flour, manufactured and packed by the plaintiffs, were issued citations by weights and measures inspectors of the New York City Department of Consumer Affairs. The citations were issued for offering for sale on the retail shelf individual packages of flour which were labeled as containing five pounds net weight but which, upon weighing by the inspectors, were found to be unreasonably shortweight. In determining whether the packages of flour were shortweight, the local weights and measures inspectors applied the federal guidelines for unreasonable-

* Although plaintiffs state in their Notice of Appeal (Joint Appendix, p. 327a) their intention also to appeal a third order, entered June 26, 1974, which denied their application for an injunction pending this appeal, no claim of error with respect to the latter ruling is presently pressed.

ness of minus errors (shortweights) as set forth in Handbook 67 published by the National Bureau of Standards, United States Department of Commerce, designed for use by state and local weights and measures officials.

To insure their retailers against liability for possible civil penalties adjudged against them on the basis of these violations in a subsequent civil action brought by the defendant Commissioner, the plaintiffs bring this action seeking a judgment declaring that the local ordinance is unconstitutional and enjoining the defendant from enforcing it. The following issues are raised:

1. Was the District Court correct in dismissing plaintiffs' claims under the Due Process Clause since the Court found that the defendant, in the historic exercise of its police power to enforce local weights and measures laws, could properly construe the ordinance to allow reasonable variations from stated weight?

2. Was the District Court correct in dismissing plaintiffs' claim that the local ordinance places an unnecessary burden on interstate commerce?

3. Was the District Court correct in finding that the local ordinance is neither preempted by nor in conflict with the Federal Pure Food, Drug and Cosmetic Act and the Fair Packaging and Labeling Act?

Facts

There is essentially no dispute as to the facts in this case.

Plaintiffs are millers who are engaged in interstate commerce in the manufacturing, packaging and selling of wheat flours (10a).*

* Numbers in parentheses refer to pages of the Joint Appendix.

On January 17, February 21 and March 8, 1973, certain of plaintiffs' retailers were cited for offering for sale 78 "five pound" bags of plaintiffs' flours which, when weighed by the Department's weights and measures inspectors, were found to contain amounts deemed unreasonably shortweight under §833-16.0 (35a-37a). The minus errors (shortweights) ranged from 9/16ths of an ounce to 45/16ths of an ounce (2 and 13/16th ounces) (35a-37a). Twenty-nine of the packages were shortweight by two ounces or more (41a-47a). No violation was issued for a package found to be shortweight by only 5/16ths of an ounce (36a, 51a, 57a). Each of the affected retailers sought reimbursement from the plaintiffs for the cost of the challenged packages and for any fines they might be required to pay (17a). To retain the valuable good will of their customers, plaintiffs agreed to make such reimbursement (17a).

The Administrative Code of the City of New York provides, pursuant to §833-16.0, that it is unlawful to sell or offer for sale any article of merchandise with a misrepresentation of that commodity's true weight. This ordinance is directed at making certain that the customer receives the "true weight" of a product at the time of its sale (49a-50a). The defendant Commissioner, who is charged with enforcing all laws relating to weights and measures in the City of New York, allows the same tolerance in measuring true weight as is allowed under federal law (33a-34a). In determining whether a prepackaged commodity is shortweight, the inspectors of her Department employ the federal guidelines for unreasonableness of minus errors (shortweights) set forth in Handbook 67 of the National Bureau of Standards, United States Department of Commerce (33a). The Handbook states in its preface that it is "designed to present in compact form comprehensive guides for State and local weights and

measures officials. This Handbook presents an operational guide for the control, under law, of prepackaged commodities" (33a). Thus, only shortweights in excess of 3/8ths of an ounce on the five-pound packages of flour resulted in the issuance of violations (34a, 41a-47a).* The Commissioner is bound by state law to determine the allowable variations from stated weight according to the federal guidelines (67a-69a).

A retailer issued a violation for selling goods unreasonably shortweight "is not absolutely liable" for any penalty (51a). He may always assert as a defense in a civil suit to collect the penalty, that the shortweight was "nevertheless 'reasonable'—i.e., 'ordinary', 'customary' and 'unavoidable' and in the course of 'good distribution practice.'" (51a, 58a-59a). The federal guidelines are used only to determine when to shift the burden of proving "reasonableness" to the retailer (52a).

Pursuant to its authority under Chapter 36, Title A, §833-22.0 of the Administrative Code and Chapter 64, Title A, §2203-5.0 of the Administrative Code (the Consumer Protection Law of 1969, Local Law No. 83), the Department held informal hearings on April 18, 1973, at which counsel for the plaintiffs appeared (37a). Penalties ranging from $10 to $25 for each package of unreasonably shortweight flour were recommended in settlement of the violations (37a). These settlements have not been paid (37a). The plaintiffs, who are not themselves offering the flour for sale within the City, have not been issued any citations under §833-16.0; nor are they liable for the payment of any penalties assessed thereunder (38a). The retailers are not liable for the payment of any penalties

* The Department's records covering a seven-year period from January 26, 1967 to October 15, 1973, show that plaintiffs General Mills and Pillsbury are the most frequent offenders, among flour manufacturers, of the ordinance (Exh. 4, 61a).

for these violations until such time as a judgment may be obtained against them in a civil action brought by the Department (Administrative Code §§833-21.0, 833-22.0; see also §2203d-4.0).* Section 833-22.0 mandates a civil penalty of $100 for each violation.

Under the federal regulatory scheme, as established by the Federal Food, Drug and Cosmetic Act, the Fair Packaging and Labeling Act and the regulations promulgated thereunder, plaintiffs are prohibited from introducing their five-pound bags of flour into interstate commerce at less than their net weight, allowing for reasonable variations caused by change in moisture content during the course of good distribution practice or unavoidable deviations in good manufacturing practice (13a-14a). Variations from the net quantity, which must be accurately and separately stated upon the principal display panel of the label, shall not be unreasonably large (13-14a). Federal law does not permit any qualifying words or phrases to appear in the same label with the separate statement of the net quantity (See Fair Packaging and Labeling Act, 15 U.S.C. §1453 [b]). The law's coverage extends essentially only to manufacturers (*ibid.*). The federal law and regulations are aimed at providing consumers with accurate information as to the net quantities of packages in order to facilitate value comparisons (*id.* at §1451).

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* Although §833-23.0 provides for criminal fines ranging from $25 to $250 for each offense, in addition to possible imprisonment, the Department does not undertake criminal prosecutions in enforcing the ordinance (307a, 318a). While plaintiffs repeatedly assert their fear of imminent criminal prosecutions (19a, 286a, 289a, 313a-316a), they are unable to allege that they have been threatened with criminal prosecutions or that the retailers, the parties to whom violation notices are issued, have ever been threatened with criminal violations (319a). However, when "the parties charged with the violations refuse to pay the recommended settlement amounts, it is incumbent upon the department to institute civil actions to recover these penalties" (Affidavit of Joseph Halpern, 318a; see also 304a-308a). The retailers may raise all their defenses in these civil actions (306a-308a).

To insure their retailers against liability for possible civil penalties adjudged against them on the basis of these violations in a subsequent civil suit brought by the defendant Commissioner, plaintiffs bring this action seeking a judgment declaring that the local ordinance is unconstitutional and enjoining the defendant from enforcing it (21a).

The complaint alleges that the Department of Consumer Affairs, having established its own standards under §833-16.0 for regulating the sale of wheat flour within the City, sends its agents to various markets to inspect bags of flour offered for retail sale (14a). If the bags are found to weigh less than their stated weight, it is alleged that it is the Department's practice, without attempting to determine the cause of the underweight condition of an individual bag, to order the bags "off-sale" and cite the merchants with criminal violations (15a). Plaintiffs charge that these practices are arbitrary and totally ignore that the cited underweight condition might be due to unavoidable loss of moisture which is permissible under federal law (15a).

The complaint charges that §833-16.0, on its face and as enforced, constitutes an unconstitutional taking of plaintiffs' property in violation of their due process rights and is an unlawful attempt by the City "to regulate interstate commerce" (19a). Further, it is charged that the ordinance "conflicts with the provisions of" federal law and is thereby "expressly preempted by the Federal Government" (20a). Plaintiffs assert that they are subject to repeated "harassments . . . confiscations . . . prosecution . . . [and] repeated interference with the legitimate conduct of their businesses" by the Department and that each plaintiff has "suffer[ed] irreparable injury to its

reputation among retailers and the consuming public" (19a-20a).

In her answer, the defendant Commissioner denies, *inter alia,* that she does not allow for those reasonable weight variations that are allowed under federal law; that her inspectors have a duty to or could in fact objectively ascertain the conditions to which unreasonably shortweight packages have been exposed, or the weight and moisture content of such packages at the time of packing and shipping; and that the practice of adding liquid to flour when used compensates the consumer for unreasonable weight shortages from stated weight on individual bags of plaintiffs' wheat flours (28a-31a). The defendant Commissioner asserts that the ordinance is a "traditional . . . exercise of local police power" to insure that the consumer receive the true weight of a product at the time of its sale (38a).

At the hearing of January 28, 1974 on plaintiffs' motion for a preliminary injunction, and the defendant's motion for summary judgment, plaintiffs put into evidence an affidavit by Malcolm W. Jensen, who wrote Handbook 67 when he served as Assistant Chief of the Office of Weights and Measures in the National Bureau of Standards (91a-96a, 115a-118a). Mr. Jensen apparently had intended the table of unreasonable minus or plus errors to be used only with respect to weight deviations of prepackaged commodites at the time of packaging "either because of the nature of the commodity or the limitations of the packaging machinery or of humans involved in the packaging or check-weighing operation" (92a). He states that the Department's use of the table to determine the reasonableness of weight variations due to loss of moisture content during distribution is a "misuse of the Handbook and indicates a misunderstanding of the purpose and

application of the so-called 'guidelines' " (96a). Mr. Jensen points out that the Handbook advises that the determination of reasonable hygroscopic variations during distribution practices be made by each individual inspector on the basis of his own experience and judgment (93a-94a).

A supporting study was put into evidence to prove that flour will gain or lose weight when stored at various relative humidities (100a). If the relative humidity goes down to 20 percent, a five-pound package of flour can lose as much as 8 percent of its original weight (101a). Plaintiffs offered evidence that relative humidities in grocery stores in the winter months in the New York area frequently go below 30 percent, and even reach 20 percent on many occasions (101a, 102a). A five-pound bag of flour which is exposed to a relative humidity as high as 36 percent would lose 2.9 ounces after 35 days of storage under these conditions (102a). Plaintiffs argued that this loss exceeds any of the shortweight violations with which they were cited (102a-103a).

Plaintiffs admitted that the "dry test" they had run on the thirteen recovered five-pound bags of flour showed that these bags had all been overpacked, *i.e.*, packed in excess of the overpack tolerance permitted under the federal guidelines (105a, 125a-127a). Some were overpacked by more than two ounces (127a). However, plaintiffs contended that federal law does not permit "overpacking" (107a). Plaintiffs argued that they, the millers, could not control loss of weight once the packages went beyond their possession to the retail shelf (106a). Moreover, different atmospheric conditions prevailing throughout the country made it impossible to control the weight of the flour when it was shipped interstate (120a).

The Department argued that not all moisture loss was caused by conditions that ordinarily occur in good dis-

tribution practice (121a). Moisture loss could be caused by improper storage conditions on the retail shelf (121a). Moreover, thirty percent of the violations that occurred during the period between 1967 and 1973 happened during the summer months when humidity is high and flour could be expected to gain weight (122a). The Department pointed out that federal, state and city law are all directed toward protecting the consumer from misrepresentations of weight and that it was improbable that any violations would be issued for packages in excess of the stated weight (122a). The Handbook itself suggests certain "plus allowances" for overpacking such packages that are susceptible to moisture loss (121a). In applying the federal guidelines in Handbook 67, the Department is following state law (122a). It would be too cumbersome to impose upon the local inspectors the burden of determining on-site whether various food products, most of which are hygroscopic, were unreasonably shortweight without applying any objective standards (124a).

By order filed March 8, 1974, the District Court denied plaintiffs' motion for a preliminary injunction and granted defendant partial summary judgment (139a). The only issue referred for trial was whether §833-16.0, as applied to plaintiffs, unnecessary burdens interstate commerce (139a).

A three-day trial on the application for a permanent injunction was conducted by the Court from April 29 to May 1, 1974.

There was testimony that moisture is added to the wheat to facilitate the milling process in reducing the grain to flour (168a-171a). The addition of moisture to the wheat also allows the reduction process to be accomplished with "a minimum of power cost" (180a). When government

orders are placed for flour with a specification of a very low moisture content, Pillsbury uses an artificial drying process and then packs the flour in moisture-proof bags (175a). Flour packed in such bags will not gain or lose moisture (181a). While the artificial drying process is used for special purposes, it requires expensive equipment and the "milling industry . . . is not tooled up to dry flour" (176a). In the case of "family flour", Pillsbury makes no effort to reduce the moisture content after the milling process and before packaging (183a-184a). Pillsbury does, however, reduce the moisture in special flours which go into cake mixes and similar items in order to increase their "shelf life" (184a).

At the General Mills plants, flour is overpacked in an amount equal to a standard net weight or "target weight" to compensate for any possible moisture loss between the time of packaging and the time the flour leaves the possession of the company (192a-193a, 217a-220a). A five-pound bag is usually overpacked by 1/2 to 7/10ths of an ounce to insure that the bag weighs five pounds at the time it leaves the plant (219a-220a). The cost of this overpacking is passed to the consumer since the company prices the five-pound bag of flour as though it weighed five and 1/2 ounces (222a). General Mills could not overpack sufficiently on much of its present machinery to compensate for moisture losses now occurring on the retail shelves (194a). Such overpacking would be less of a problem with the plants' other machines which do not make their own packages (194a). To comply with the requirement of the City's ordinance that a bag of flour not be unreasonably shortweight at the time it is sold to the consumer, General Mills would have to make a large capital investment to replace certain machinery and institute artificial drying (212a-213a). The increased costs would probably be passed to the consumer (213a).

The Federal Food and Drug Administration sends inspectors to the plaintiffs' plants (227a). These inspectors have never issued a violation to the plaintiffs for overpacking (227a). The practice of the Federal Food and Drug Administration in enforcing the accuracy of quantity declarations on the packages is to check the packages at the mills or at the time they are handed over to the distributor, be it wholesaler, common carrier, or retailer (246a-247a). Federal inspectors do not check individual packages on the shelves in supermarkets and grocery stores (249a, 255a-257a). Federal inspectors address themselves only to whether the "lots" or "packages entered into interstate commerce do on the average contain the quantity declared and that there be no unreasonable errors" (253a).

Although there was testimony that all the General Mills bags of flour have code numbers on them, identifying the plant of manufacture, the Department introduced a bag of General Mills' Gold Medal Flour on which the witness for General Mills, the manager of its Buffalo plant, could not at first discern any such code marking (230a).* After plaintiffs' counsel pointed the marking out, the witness testified "it was all mashed up" (230a). When the Buffalo plant manger was shown a code number on a different bag, he could not decipher its meaning or identify the plant from which the bag had come (235a-236a). When the package was squeezed by counsel for the Department, white powder seeped through the bag (233a). However, the plant manager testified that bags of flour require no special handling during distribution (233a). The bags are distributed in bales (233a). The witness was not aware of any special in-

* Plaintiffs claim that these codes numbers can be used by the Department's inspectors to track down the mill's records on each bag to ascertain the weight of the bag at the time of packaging, thereby determining the cause of any subsequent weight loss (18a-19a).

structions from the plaintiffs to the distributors and retailers on how to handle the bags of flour (233a).

At the close of plaintiffs' case, the District Court granted the defendant's motion to dismiss the complaint.

Opinions Below

The opinions of the District Court, are reproduced at pages 131a-138a and 322a-326a of the Joint Appendix. The Court found that there was "no merit" to plaintiffs' due process claim since §833-16.0 allows for reasonable variations from stated net weight and is administered reasonably by the Department (135a-136a). The Court also found that the local regulation is not preempted by federal law since Congress intended to preempt only state laws which were less stringent than or incompatible with the federal statute (137a). Plaintiffs concede that the city ordinance is more stringent and the Court found the two laws were "not incompatible" (137a). Finally, the Court found that the City has a legitimate interest in regulating weights and measures and that the ordinance does not "unnecessarily burden interstate commerce" (324a-326a).

POINT I

The ordinance here challenged is a reasonable and constitutional exercise of the City's police power. The Department properly construes the ordinance to allow for reasonable variations from stated net weight. Moreover, the Department's practice of enforcing the ordinance according to federal guidelines is reasonable and does not violate plaintiffs' due process rights. The District Court's grant of summary judgment on this issue was proper.

What is involved here is the City's power to insist that the consumer receive the true weight of a product *at the time of sale.* Section 833-16.0 provides in relevant part:

> "It shall be unlawful to sell or offer for sale any commodity or article of merchandise, at or for a greater weight or measure than the true weight or measure thereof; . . ."

Plaintiffs contend that this ordinance offends due process in that, on its face, it does not allow for reasonable variations from stated weight and that, as applied by the defendant Commissioner, the variations from stated weight which are allowed are still not reasonable. With respect to the latter contention, plaintiffs assert that the Commissioner's enforcement of the ordinance is arbitrary, and unreasonable.

Briefly, our answer to these due process contentions is as follows: First, the object of this ordinance is to ensure that consumers receive at the point of sale the amount of a commodity the seller represents he is delivering. We are aware of no Due Process Clause impediment to a state's

requiring precisely that. Indeed, historically it has been unquestioned that under the police power state officials have every right to require accurate weights and measures at the point of sale.

Second, the local ordinance as enforced, pursuant to mandate of state law to provide for reasonable variations from stated weight, is not enforced in an arbitrary or unreasonable manner. As indicated, the ordinance is concerned with weight at point of sale, not at some earlier point, and, given this legislative objective, there has been here no showing that the variations allowed by the defendant Commissioner are arbitrary or unreasonable.

(1)

By virtue of state delegation of power (see New York State Constitution, Article IX, §2[c], [ii], [10]; General City Law, §20[13]; Municipal Home Rule Law, §10[1] a[12]; and New York City Charter, Chapter 2, §27),* the

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* The "home rule" provision of the New York State Constitution provides insofar as relevant:

> "[E]very local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, * * * except to the extent that the legislature shall restrict the adoption of such local law * * *: (10) The government, protection, order, conduct, safety, health and well-being of persons or property therein."

The General City Law and Municipal Home Rule Law reiterate this grant of power over matters relating to the health, comfort and well-being of inhabitants of the city and expressly add that for these purposes, a city may adopt local laws providing for the regulation or licensing of occupations or businesses. The police power is also authorized by the cited section of the New York City Charter, which provides, in pertinent part, that the city council:

> "shall have power to adopt local laws as to it may seem meet, which are not inconsistent with the provisions of this charter or with the constitution or laws of the United States or of this

City of New York participates with the state in its traditional responsibility of protecting its people from improper statements of weight. In the City, responsibility for safeguarding the public from such deception rests with the Commissioner of Consumer Affairs, who is directed to "enforce all laws in relation to weights and measures" (New York City Charter, Chapter 64, §2203[b]). The Commissioner is also the official City Sealer of the City of New York under the New York State Agriculture and Markets Law, Article 16, §183, and, accordingly, whenever she "finds a violation of the statutes relating to weights and measures [s]he shall, as [s]he deems necessary, cause correction to be made or cause the violator to be prosecuted" (Agriculture and Markets Law, Article 16, §182).

Despite plaintiffs' assertions to the contrary (Br., p. 15), the Commissioner, in the exercise of her powers under both the Agriculture and Markets Law and the Administrative Code of the City of New York, §833-16.0*, is bound by the rules and regulations promulgated by the State Commissioner of Agriculture and Markets. Section 180 of the Agriculture and Markets Law provides that the State Commissioner:

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state * * * for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants."

There can be no doubt under these provisions of the police power of New York City to legislate, consistent with the federal and state constitutions and general law, to promote the well-being of its inhabitants. *People* v. *Cook*, 34 N Y 2d 100, 105 (1974); *Good Humor Corp.* v. *City of New York*, 290 N.Y. 312, 317 (1943).

* These powers are augmented by the Consumer Protection Law of 1969, Local Law No. 83, amending both the New York City Charter and the Administrative Code of the City of New York, giving the Commissioner of Consumer Affairs specific powers to protect the public from "deceptive or unconscionable trade practices" in the sale of goods (see New York City Charter, Chapter 64, §2203[e] and Administrative Code, Chapter 64, §§2203d-1.0 *et seq.*).

"Shall establish specifications, amounts of tolerance, or reasonable variations allowable for weights, measures and weighing and measuring devices, and shall make rules and regulations for the purpose of making clear and effective the provisions of this chapter relative to weights, measures and weighing and measuring devices, which rules and regulations shall have the force and effect of law, and he shall issue instructions to the county and city sealers and these shall be binding upon and govern said sealers in the discharge of their duties."

The Commissioner of Agriculture and Markets has, by regulation, as required by state law, established the variations from declared net quantity to be allowed in the enforcement of weights and measures laws. Title 1, Chapter V, §221.8 of the Rules and Regulations under the Agriculture and Markets Law provides:

"Variations to be allowed.

(a) *Variations from declared net quantity.* . . . [W]hen caused by unavoidable deviations in weighing . . . the contents of individual packages that occur in good packaging practice. . .

(b) *Variations resulting from exposure.* Variations from the declared net weight or measure shall be permitted when caused by ordinary and customary exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight or measure, but only after the commodity is introduced into intrastate commerce. . ." *

* The language of the state regulation tracks that of the Model Regulation for Prepackaged Commodities adopted by the National Conference on Weights and Measures and by the Federal Food and Drug Administration (Handbook 67, pp. 1-2; 356a-357a).

Thus, there can be no doubt that the "true weight" language in §833-16.0 is properly construed by the Commissioner to allow reasonable variations from declared net weight as required by state law and regulation.

Even if the Commissioner were not mandated by state law so to construe the ordinance, in view of its lack of definition of "true weight", her interpretation of the ordinance, which she is charged with enforcing, would govern. Nor would her interpretation be defeated, as plaintiffs contend, by mere failure to embody it in a regulation. *Board* v. *Hearst Publications,* 322 U.S. 111, 131 (1944); *United States* v. *Shreveport Grain & El. Co.,* 287 U.S. 77, 84 (1932); *Swift & Co.* v. *Wickham,* 230 F. Supp. 398, 401 (S.D.N.Y., 1964), (three-judge court), aff'd. 364 F.2d 241, 243 (2d Cir., 1966), cert. den. 385 U.S. 1036 (1967); *Roosevelt Hosp.* v. *Labor Relations Bd.,* 27 N Y 2d 25, 34 (1970); *Matter of Willcox* v. *Stern,* 18 N Y 2d 195, 203 (1966); *Red Hook Cold Storage Co.* v. *Dept. of Labor,* 295 N.Y. 1, 9 (1945); *Matter of Mounting & Finishing Co.* v. *McGoldrick,* 294 N.Y. 104, 108 (1945). Moreover, the Commissioner's interpretation is supported by judicial construction of the ordinance. See *Emerald Packing Corp.* v. *Hygrade Food Products Corp.,* 23 Misc. 2d 915 (App. Term, 1st Dept., 1960). See also *City of New York* v. *Sulzberger & Sons Co.,* 80 Misc. 660 (App. Term, 2d Dept., 1913) and *City of New York* v. *Marco,* 58 Misc. 225 (App. Term, 1st Dept., 1908), for the identical interpretation of §388 of the Code of Ordinances of Greater New York, 1917, the predecessor to §833-16.0.*

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* The conclusions reached by the courts in the above cited cases that the sales in those cases were not unreasonably shortweight, allowing for natural shrinkage due to evaporation, were the same as would have been reached by the Commissioner had she applied the federal guidelines on page 8 of Handbook 67.

(2)

Plaintiffs do not dispute that in *enforcing* the ordinance, the Department allows for weight variations in hygroscopic food commodities from moisture loss.* The thrust of plaintiffs' argument that the ordinance, as applied, violates due process is that the Department, in issuing violations, mechanically applies the table of "unreasonable minus or plus errors" in Handbook 67. Plaintiffs' claim, based upon the assertions of the table's author, is that the table was not intended to measure reasonable weight variations resulting from moisture loss during distribution, and that, consequently, the table does not make adequate allowance for these losses. However, as the District Court, which found "no merit" to plaintiffs' due process claim, correctly perceived (135a):

> "Defendant, charged by N.Y. Agriculture and Markets Law, §183, and Administrative Code of the City of New York, §833-21.0, with the responsibility of determining whether violations should be issued . . . could have rationally concluded that, ordinarily, weight variations greater than those indicated on p. 8 of Handbook 67 were unjustified. *Neither procedural nor substantive due process requires absolute certainty to support the issuance of a violation.*" (Emphasis added)

Similarly the Court, in its second opinion stated (324a-325a):

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* There is no dispute that, according to the table, the Department deems shortweights to be reasonable if in amounts less than 3/8ths of an ounce on plaintiffs' five-pound bags of flour (134a). The Department asserts, and plaintiffs do not deny, that no violations were issued here on five-pound bags that were less than 3/8ths of an ounce short (36a, 51a, 143a).

> "[I]t is not enough to show that defendant applies the table in a manner contrary to the intent of the handbook's author. . . . The handbook has no binding effect on states or municipalities since it merely describes 'a method for controlling various types of prepackaged commodities' . . . *The question is whether the City is acting reasonably when it concludes that variations of the magnitude described in the table are ordinarily unjustified, bearing in mind that the table is only used to determine whether there has been a prima facie violation of the ordinance.*" (Emphasis added)

The necessary implication of plaintiffs' argument is that substantially all weight losses in its five-pound bags of flour are due to unavoidable moisture loss (Br., p. 17, fn. 7). But it was established during the hearings that weight variations may be the result of leaks or seepages from the packages, or of a certain slack filling by the packagers. Variations can also result from poor distribution practices, *e.g.,* improper handling of the bales of flour, overly long storage or storage too close to a source of heat, causing excessive moisture loss. As to plaintiffs' claim that the on-site weights and measures inspectors should determine, without application of any objective standards, whether an individual bag of flour is unreasonably shortweight by checking code numbers and plant records, the Court noted (325a-326a):

> "An inspector cannot be required to determine, in advance of issuing a summons, whether a weight variation is impermissible. It is enough that after the summons is issued the retailer be afforded a reasonable opportunity to show that the weight variation is unavoidable. . . . Plaintiffs have made no showing that the fact that weight variations resulted from inevitable

moisture losses would not be recognized as a defense in such proceedings."

(3)

Plaintiffs fail to demonstrate any possible way in which §833-16.0 violates their due process rights. The ordinance does no more than subject them to an exercise of traditional local police power rationally designed to ensure that the consumer receive the true weight of a product at the time of sale. The challenged ordinance, particularly its "true weight" language, has been the law in this City since 1917 (cf. Code of Ordinances of Greater New York, 1917, §388).

There is a presumption of the existence of a state of facts sufficient to justify the exertion of the police power. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154 (1938); *Pacific States* v. *White*, 296 U.S. 176, 185-186 (1935); *National Psych. Assn. Inc.* v. *University of State of N.Y.*, 8 N Y 2d 197, 203 (1960), app. dism. for want of a substantial federal question, 365 U.S. 298 (1961). The courts may not substitute their judgment so long as there is any supporting state of facts which is "either known or which could be reasonably assumed." *United States* v. *Carolene Products Co., supra; Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952); *Olsen* v. *Nebraska*, 313 U.S. 236, 246 (1941). *A fortiori*, here, where there is an extremely reasonable legislative pronouncement for dealing with the sale of shortweight commodities, an "old, obstinate and multifarious evil demanding vigilant and vigorous law enforcement", there is no basis for invalidating the ordinance as unreasonable (Furness Affidavit, para. 2, 49a; see also attached article, "Shortweighting, nothing for something" 54a-56a).

Nor is the ordinance rendered invalid because it may impose some degree of economic hardship on plaintiffs or diminish their profits. See *United States* v. *Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Breard* v. *Alexandria*, 341 U.S. 622, 632-633 (1951); *California Automobile Assn.* v. *Maloney*, 341 U.S. 105, 110-111 (1951). As the Supreme Court said in *Breard* v. *Alexandria, supra*, the Due Process Clause of the Fourteenth Amendment does not render a state or a city impotent to protect the well-being of its citizens by a regulation which "may restrict the manner of doing a legitimate business . . . in the public interest." The case of *Armour Co.* v. *North Dakota*, 240 U.S. 510 (1916) is especially relevant here. In *Armour*, the plaintiff was required to change its packaging process in the interest of protecting consumers against misrepresentations of net weight. The Supreme Court said (at p. 516):

> "This [North Dakota's statute requiring lard to be packed by net rather than gross weight] may involve a change of packing by the company and the cost of that change, but this is a sacrifice the law can require to protect from the deception of the old method. The law is allied in principle, . . . to regulations in the interest of honest weights and measures. It involves no giving up of what the company has a right to retain and the cost of the container as well after change as now can be cast upon the purchaser, he, however, being able to determine if it is worth the price he has to pay for it."

Plaintiffs' mere assertion that the ordinance benefits no one, (Br., p. 30-31), raises no serious question as to its wisdom and practicality. There would be no constitutional infirmity even had plaintiffs successfully demonstrated that the City "has adopted measures which will not achieve

what is hoped or, if so, at a greater cost than necessary" (*Oriental Boulevard Company* v. *Heller*, 27 N Y 2d 212, 219 [1970], app. dism. for want of a substantial federal question, 401 U.S. 986 [1971]). In *Oriental Boulevard* the court concluded (27 NY 2d at 219):

> ". . . the rebuttal is that such arguments, however cogent they may appear to be, do not affect the constitutionality of the ordinance. Efforts at solution of serious problems will not wait on perfect knowledge or the application of optimal methods of alleviation to the exclusion of trial and error experimentation."

Similarly, plaintiffs' reliance upon the case of *Overt* v. *State*, 260 S.W. 856 (Tex. Crim. App., 1924), is unavailing. In that case, the defendant had been convicted for offering for sale a sack of flour labeled as containing 48 pounds of flour but which actually contained 47 pounds 9 ounces. Reference to Handbook 67's table of objective guidelines for "reasonableness" shows that for packages of labeled quantity of 36 to 51 pounds, minus errors (shortweights) up to 8 ounces are considered prima facie reasonable. Overt's sack of flour was 7 ounces shortweight. Thus, if Overt offered the very same sack of flour for sale in the City of New York he would not be charged with a violation of §833-16.0, because the shortweight of the flour in the sack, not in excess of 8 ounces, would be deemed to have resulted from "ordinary and customary exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight or measure" (cf. Rules and Regulations, Agriculture and Markets Law, Title 1, Chapter V, §221.8; 21 C.F.R. §1.8b[q]). Accordingly, even conceding for the sake of argument the correctness of the due process analysis employed in *Overt* v. *State*, the result there reached is not inconsistent with a holding that this ordinance is, as construed and applied, not invalid.

(4)

The Court below properly disposed of plaintiffs' due process claim by summary judgment. The Department does not dispute the hygroscopic characteristics of flour; nor do plaintiffs dispute that the Department's inspectors issue violation notices only when the weight shortages of the five-pound packages are in excess of ⅜ths of an ounce, the amount of error deemed unreasonable by Handbook 67 (see Rule 9(g) statements of plaintiffs and defendant, 81a-82a, 90a). The only arguable issue is whether the Department's use of the table to determine whether the consumer is receiving the true weight of the product, allowing for reasonable variations at the time of sale, is proper.

Plaintiffs attempt to manufacture an issue of fact by claiming that the ⅜ths of an ounce allowance does not cover *all* "ordinary", "customary" and "unavoidable" weight variations of the bags of flour which occur in "good" distribution and merchandising practice, especially during the winter months. However, this analysis misses the point. Plaintiffs misconstrue the defendant's application of the federal guidelines. The federal standards are only an "operational guide" to enable local weights and measures inspectors to enforce §833-16.0 and like ordinances (354a; Preface to Handbook 67). The guidelines do not determine *per se* unreasonableness in every, or indeed any, case. When the guideline is exceeded, the result is only to shift to the retailer the burden of explaining that the excessive weight loss, whether due to moisture or some other cause, was "ordinary" and "avoidable" in the course of "good" distribution practice by him (51a-52a; Furness Affidavit, para. 8).

The implication of plaintiffs' argument is that all weight losses due to *moisture* loss would be presumed reasonable.

However, this position is in patent conflict with the federal regulation which proscribes variations in stated net weight due to *excessive, i.e.,* unreasonable, moisture loss (21 C.F.R. 1.8b[q]).

The implications of plaintiffs' position are further revealed when we consider that the standard of identity for flour in the federal regulation provides that flour can have a moisture content of "not more than 15%" (21 C.F.R. 15.1). Theoretically, under certain distribution and merchandising conditions, all the moisture in a given quantity of flour might evaporate. Accepting plaintiffs' proposition that all weight variation due to moisture loss is *per se* reasonable, a loss of 15 per cent of the weight of a five-pound bag, *i.e.,* twelve ounces, would be presumed proper. It can only offend one's sense of propriety to accept that the consumer should receive only four and one-quarter pounds in a "five-pound" bag. This is especially so when one considers that the consumer is already being charged as if the bag contained five pounds and one-half ounces of flour (222a).

More absurd, plaintiffs require that the on-site inspectors of the Department determine whether the weight variation was "not ordinary", "not customary", was "avoidable" and occurred in the course of "bad" or "mediocre" distribution or merchandising practice. Clearly, the inspectors cannot be expected to do this.

To accept plaintiffs' position would be to render §833-16.0, and most other state and local ordinances proscribing shortweights, a dead letter, not only in its application to flour but to most food containing moisture. Plaintiffs' position, if accepted, would tie the hands of the defendant Commissioner in the pursuit of her duty to protect consumers against misrepresentations of weight. Moreover, plaintiffs' position would allow a type of packaging and re-

tailing that doesn't concern itself with guarding against weight variation from loss of moisture content. The inevitable consequence would be the saturation of different types of foods by the addition of moisture, up to the outside limit allowed by federal regulation, with the result that at the point of sale consumers would be consistently getting less than true weight and the City would be powerless to correct this vice. Obviously, the City ordinance is not aimed at "locking in" the moisture content, at the same percentage as originally packed, but in making certain that consumers receive a reasonable amount of the nutritional dry contents in the "five-pound" bag of flour.

POINT II

Section 833-16.0 does not represent an unreasonable interference with interstate commerce.

Plaintiffs' claims that the local weights and measures ordinance imposes an undue burden on interstate commerce are equally groundless.

(1)

Since moisture content constitutes a considerable portion of the net weight of plaintiffs' flours,* there can be significant variations in the stated weight after distribution and storage on the retail shelf. The Department's records show variations in excess of 2¾ ounces on these five-pound bags (35a-37a). This is more than seven times the variation allowed under the federal guidelines. "Protection of the public against false weights and measures or misleading statements about them is one of the oldest exercises of governmental regulatory power." *Swift & Co., Inc.* v.

* Plaintiffs testified that at the end of the milling process, family flour has a moisture content as high as 13½ to 14% (169a).

Wickham, 230 F. Supp. 398, 402 (S.D.N.Y., 1964), (three-judge court), affd. 364 F. 2d 241, 246 (2 Cir, 1966), cert. den. 385 U.S. 1036 (1966).

We are told by plaintiffs' own expert witness that the federal inspectors do not even concern themselves with the weights of individual packages on the retail shelf (294a-250a, 253a, 255a-257a). On similar facts, Judge FRIENDLY rejected in *Swift & Co.* v. *Wickham, supra,* the argument that the commerce clause was violated by the state regulation.* He stated (at p. 402):

> "That the framers of the Constitution did not intend that laws of such ancient vintage in New York and other states must yield to an unexercised national authority in the case of goods coming from outside the state is obvious from the mere statement. But the point is further demonstrated by the provision in Article I, §10, that 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports and Exports, except what may be absolutely necessary for executing its inspection Laws * * *'."

In the face of claims of unreasonable interference with interstate commerce, the Supreme Court has stated, specifically with reference to flour, that the regulations of weights is an appropriate subject of state inspection. See *Patapsco Guano Co.* v. *Board of Agriculture of North Carolina,* 171 U.S. 345, 358, 361 (1898). Corollary to a state's power to prohibit the sale of articles bearing false statements as to weight, is the state's power to insist on reasonably accurate

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* The principles applicable to state legislation and regulation govern in determining the validity of municipal action which is challenged as being unconstitutional. *Cuyahoga Power Co.* v. *Akron,* 240 U.S. 462 (1916); see *Pacific States Co.* v. *White,* 296 U.S. 176, 186 (1935).

representations as to weight. It is in no way fatal to such state regulations that they may incidentally affect interstate commerce by requiring out-of-state manufacturers to alter their processes, if in ways not unduly burdensome. *Patapsco Guano Co.* v. *Board of Agriculture of North Carolina, supra,* 171 US at p. 361; *Reid* v. *Colorado,* 187 U.S. 137, 150 (1902); *Crossman* v. *Lurman,* 192 U.S. 189, 197 (1904); *Savage* v. *Jones,* 225 U.S. 501, 524-526 (1912); *Sligh* v. *Kirkwood,* 237 U.S. 52, 58-61 (1915); *Armour & Co.* v. *North Dakota,* 240 U.S. 510 (1916).

Historically, the Supreme Court has been adverse to annulling an exercise of state police power designed, like the local ordinance here, to prevent deceptive trade practices in the sale of food products. In *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963), the Supreme Court stated (at p. 144):

> "Specifically, the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern. Many decades ago, for example, this Court sustained a State's prohibition against the importation of artificially colored oleomargarine (which posed no health problem), over claims of federal preemption and burden on commerce. In the course of the opinion, the Court recognized that the States have always possessed a legitimate interest in 'the protection of . . . [their] people against fraud and deception in the sale of food products' at retail markets within their borders. *Plumley* v. *Massachusetts,* 155 U.S. 461, 472. See also *Crossman* v. *Lurman,* 192 U.S. 189, 199-200; *Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497; *Savage* v. *Jones,* 225 U.S. 501, 525-529."

Emphasizing that the state's police power is particularly appropriate when aimed at the retail shelf, the Court continued (p. 146):

> "While it is conceded that the California statute is not a health measure, neither logic nor precedent invites any distinction between state regulations designed to keep unhealthful or unsafe commodities off the grocer's shelves, and those designed to prevent the deception of consumers. See, *e.g. Hygrade Provision Co.* v. *Sherman, supra,* [266 US 497, 501-503 (1925)]; *Plumley* v. *Massachusetts, supra.*"

In *Plumley* v. *Massachusetts,* 155 U.S. 461 (1894), cited in the above quotation, the Court originally made clear that the commerce clause extends no protection to a manufacturer or seller in the practice of "fraud and deception in the sale of food products" (p. 472).

(2)

The only restrictions upon state regulations in this area are those laid down in *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra,* 373 U.S. at pp 153-154. As pointed out here by the District Court in its first opinion (135a), plaintiffs, in order to come under that decision,

> ". . . would have to prove first that the ordinance, as it is enforced, imposes standards substantially more stringent than those of the applicable federal laws. Furthermore, plaintiffs would have to prove that the municipal requirements exceed the limits necessary to vindicate legitimate local interests, unreasonably favor local producers, or constitute an illegitimate attempt to control the conduct of packagers beyond the borders of New York."

The District Court found that plaintiffs had shown at trial that the City ordinance, in its application, is substantially more stringent than federal law since federal inspectors do not examine packages on retailers' shelves where much of the moisture loss occurs and, thus, examinations by City inspectors at the retail stores result in many more charges of violations (323a-324a). Nevertheless, the Court ruled that plaintiffs had failed to show that the ordinance is unnecessarily burdensome, that its enforcement unreasonably favors local producers, or that the municipal requirement exceeds the limits necessary to vindicate legitimate local interests (324a).

Plaintiffs' proof showed no more than that the author of the federal guidelines did not intend their use for measuring hygroscopic variations and that different atmospheric conditions prevail throughout the country. Based upon this showing, the Court found that the City is acting reasonably in the issuance of prima facie violations for shortweights in excess of the federal guidelines, noting that retailers are afforded the opportunity to show that the weight loss is unavoidable before any penalties are assessed. Rejecting plaintiffs' commerce claim, the Court held that the City is only exercising its "legitimate interest in regulating weights and measures even though its regulations may inevitably require out-of-state packagers to alter their practices to conform to local standards" (326a).

(3)

Section 833-16.0 bears none of the infirmities which have caused other state regulations to be stricken under the commerce clause.

The challenged ordinance applies alike to all commodities sold or offered for sale within the City. It does not dis-

criminate against products from other states in favor of products from New York, or New York City. *Cf. Minnesota* v. *Barber,* 136 U.S. 313 (1890). It does not erect an economic barrier protecting local products against competition from without the City or the State. *Cf., Dean Milk* v. *City of Madison,* 340 U.S. 349, 354 (1951). Nor does the ordinance place the City in a position of economic isolation or unreasonably clog the mobility of commerce. *Cf., Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 527 (1935). Clearly, the ordinance does not exceed the limits of its purpose, namely, to protect consumers from deceptive representations of quantity, regardless of where the particular commodity is manufactured, packaged or labeled. *Cf., Huron Cement Co.* v. *City of Detroit,* 362 U.S. 440, 448 (1960); *Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497, 503 (1925).

POINT III

Congress has not occupied the field of food-package labeling. Moreover, there is no conflict between the local ordinance and the federal law and regulations.

A finding that this local ordinance is in conflict with federal law is not justified by the legislative history of either federal Act relied upon by plaintiffs and would only paralyze municipal exercise of the police power at the point where such exercise would be most effective in complementing the federal regulatory scheme.

In arguing that this local ordinance is "preempted" by federal law, plaintiffs concede at the outset that Congress has not evidenced an intent to occupy this field to the exclusion of state and local regulations (Brief, p. 22). Rather, plaintiffs frame their argument in terms of claimed conflicts with federal statutes and regulations. Two such conflicts are argued. First, plaintiffs simply state, without bothering to develop this argument in any detail, that the ordinance is invalid for failure to allow for variations from stated weight such as are permitted under federal legislation (21 U.S.C. §343 [e]) and regulation (21 C.F.R. § 1.8b [q]). As pointed out above, the ordinance as construed and applied does allow for reasonable variations—which would appear sufficient to answer here this branch of plaintiffs' "preemption" argument. Second, plaintiffs argue, placing primary reliance upon an *amicus* brief filed by the Antitrust Division of the Department of Justice, in a case involving a California regulation apparently requiring "overpacking" of flour packages, that this New York City ordinance, which neither in its terms nor by necessary implication requires overpacking, is in conflict with federal law.

(1)

The City ordinance has already been discussed in Point I, *supra.*

The Federal Food, Drug and Cosmetic Act prohibits the introduction of "adulterated or misbranded" food into interstate commerce, 21 U.S.C. §331. The Act then goes on to state that food shall be deemed misbranded "unless it bears a label containing . . . (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided,* that under clause (2) of this subsection reasonable variations shall be permitted, . . . by regulations prescribed by the Secretary." 21 U.S.C. §343(e). See also 21 U.S.C. §§341, 371.

The Fair Packaging and Labeling Act provides that no person "shall distribute . . . in commerce any packaged consumer commodity unless in conformity with regulations which shall be established by the promulgating authority . . . which shall provide that . . . (2) The net quantity of contents (in terms of weight, measure, or numerical count) shall be separately and accurately stated in a uniform location upon the principal display panel of that label. . . ." 15 U.S.C. §1453(a). Section 1454(a) of the Act vests the authority to promulgate regulations in the Secretary of Health, Education and Welfare with respect to consumer commodities defined by the Food, Drug and Cosmetic Act as foods, drugs, devices or commodities.

Acting pursuant to these grants of power, the Secretary promulgated the following regulation:

> "The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good dis-

tribution practice or unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large." 21 C.F.R. §1.8b (q).

(2)

Plaintiffs attempt to advance their position that the City's standards in assessing shortweights conflict with federal statutes and regulations by characterizing the City's requirements as establishing a "minimum-weight labeling" scheme. To support their position, they submit a large extract from a Department of Justice *amicus* brief in a California case, which merely states the opinion of the Department on the minimum-weight labeling scheme adopted by California. This extract forms the core of the second branch of plaintiffs' "preemption" argument. However, the record here does not support plaintiffs' assertions that the City requires them to overpack their bags in violation of federal law, which is the essence of the Antitrust Division's objection to the California scheme (App. Br., p. 29).

Moreover, plaintiffs cite no federal regulation that would be violated if they overfilled their packages sufficiently to compensate for shortweights deemed unreasonable under the City ordinance—as well as the federal standards. Federal law permits reasonable variations from stated weight, and plaintiffs, who are already overpacking to avoid federal liability, testified that they have been charged with no violations by federal inspectors for these overfills (227a). Nor would the consumer, whose interests both federal and local law are designed to protect, be hurt by such overpacking. And, indeed, federal Handbook 67 recommends legal action only for unreasonably large *minus* errors (373a; Handbook, p. 18). Finally, in judging un-

reasonable shortweights, the City does not substitute its own standards for federal standards, the evil found in another California case, which concerned shortweight meat packages, *Rath Packing Co.* v. *Becker,* 357 F. Supp. 529 (C.D. Cal., 1973). To the contrary, the City imposes the federal standards and requires no more than that the product conform to the federal standard *at the time of sale.*

The manner of compliance with this ordinance is a choice for the miller and the retailer. It may well be that the conditions giving rise to the violations issued to plaintiffs' retailers were caused by the retailers through inadequate shelving or storage procedures, by which individual packages of flour were kept for long periods in dry conditions causing excessive moisture loss. Clearly, plaintiffs need not accept responsibility for such occurrences. If, however, plaintiffs choose voluntarily to assume their retailers' responsibilities, as a decision in plaintiffs' own best business interest, in order to protect their good will and reputation, then the manner of compliance may well be through employment of different packaging methods, or drying methods, or even reducing the moisture content of the flour, after the milling process is completed, to less than 13 or 14% (12a).

(3)

The courts will apply the principle of supremacy of an act of Congress to supersede an otherwise legitimate exercise of the state police power, "only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' [citing cases]". *Kelly* v. *Washington,* 302 U.S. 1, 10 (1937). "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police

powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested * * *." *Reid* v. *Colorado,* 187 U.S. 137, 148 (1902). In *Florida Lime & Avocado Growers* v. *Paul,* 373 U.S. 132 (1903), the Supreme Court reaffirmed that (p. 142):

> "The principle to be derived from our decisions is that federal regulations of the field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulative subject matter permits no other conclusion, or that Congress has unmistakenly so ordained."

To same effect: *N.Y. State Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 413-414 (1973); *Rice* v. *Chicago Board of Trade,* 331 U.S. 247, 253 (1947); *Huron Cement Co.* v. *City of Detroit,* 362 U.S. 440, 443 (1959); *Maurer* v. *Hamilton,* 309 U.S. 598, 614 (1940).

Throughout the history of federal regulation of foods and drugs, local requirements in addition to federal ones have been sustained as against claims of federal supremacy, when there has been no conflict in the substance of the requirements. In *Savage* v. *Jones,* 225 U.S. 501 (1912), there was involved the Food and Drug Act of 1906, governing adulterated and misbranded foods. It required disclosure of ingredients in some instances but not in others. The case held that a state could require labeling to disclose ingredients in the other instances.

The same Act provided that nothing therein should be construed as directing the disclosure of the formulae of proprietary foods. In *Corn Products Refining Co.* v. *Eddy,* 249 U.S. 427 (1919). it was held that a state could require labeling to show the ingredients and their percentages. See, also, *Armour & Co.* v. *North Dakota,* 240 U.S. 510,

517 916), holding that a state could validly impose a requirement of labeling to show net weight, since that requirement had nothing to do with the purpose of the Act, which was directed against adulteration and misbranding.

Sligh v. *Kirkwood,* 237 U.S. 52 (1915), sustained a state prohibition upon the sale or shipment of immature fruit unfit for consumption. It was held that this was not precluded by a Food and Drug Act prohibition limited to food that was filthy, decomposed, or putrid.

Crossman v. *Lurman,* 192 U.S. 189 (1904), held that a state may bar the introduction of food adulterated in that it was colored or covered so as to conceal damage. The federal restraints there in issue dealt only with ingredients injurious to health.

Swift & Co. v. *Wickham,* 230 F. Supp. 398 (S.D.N.Y., 1964), affd. 364 F. 2d 241 (2d Cir., 1966), cert. den. 385 U.S. 1036 (1967), involved the federal Poultry Products Inspection Act. Containing provisions with regard to marking and labeling, the Act provided that the net weight of the package contents be shown. The courts rejected the argument that this preempted the field so as to exclude a New York State requirement that, in the case of stuffed poultry, the label show the net weight of the bird in stuffed and in unstuffed conditions. The federal Act contained an express exclusive jurisdiction provision, but this Court held that, whatever its application to the exhaustive inspection provisions of the Act, it did not preempt the field of labeling.

In *Florida Lime & Avocado Growers* v. *Paul, supra,* 373 U.S. 132, the Supreme Court sustained a California regulation which determined the maturity of avocados on the basis of their oil content. The result was to bar the marketing in that state, as substandard fruit, of Florida avo-

cados, which had been judged mature under elaborate federal marketing regulations that assessed maturity according to different standards. The Court drew a distinction between federal regulations dealing with the circumscribed area of "packing of commodities for the interstate market" and the more restrictive state regulation aimed at "marketing". In language pertinent to the issue here, the Court said (p. 145):

> "Federal regulation by means of minimum standards of the picking, processing and transportation of agricultural commodities, however comprehensive *for those purposes* that regulation may be, does not of itself import displacement of state control over the distribution and retail sale of those commodities in the interests of the *consumers* of the commodities within the State. . . . Congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all state regulation at the other end." (Emphasis in the original)

Here, as in the above cases, while the basic concerns of both governments are similar, *i.e.*, to create an informed consumer public, their laws are aimed at different targets. The federal laws are patently designed toward preventing the introduction of misbranded foods into interstate commerce. The local law attempts, at the retail level, to protect the consumer from the purchase of shortweight products. The very people who are subject to the jurisdiction of the local law, namely, retailers, are expressly excluded from coverage under the federal law. Fair Packaging and Labeling Act, 15 U.S.C. §1452(b). It would be a harsh result to invalidate the City's ordinance and thereby paralyze the local police power exercised precisely at the time when it can be most effective, the time of retail sale, to protect the City's residents against shortweight goods. There is no

federal control over the food product after it leaves the manufacturer's control (249a-250a, 253a, 255a-257a) and, thus, there is no federal remedy to cure the shortweight "ills" that obviously may befall the product during its long distribution and retail life.

There is no apparent reason in the federal regulatory scheme, ultimately aimed at protecting the consumer, for the void which would be created by invalidating the only law designed to reach the product on the retail shelf. To the contrary, the federal and local law here represent coordinate efforts in the implementation of the overall regulatory scheme aimed at creating an informed consumer public able to make accurate value comparisons between products. See the Congressional declaration of policy, 15 U.S.C. §1451,* and excerpts from the Message of the President in offering the bill, U.S. Code Congressional and Administrative News, 89th Congress, 2d Session, 1966 [Vol. 3], pp. 4084-4091.

It would only frustrate the objectives of the federal scheme to eliminate supplementary local efforts at implementation, thereby creating a "no man's land", *i.e.*, the retail shelf, which would be subject to no regulation aimed at consumer protection. Congress could not have intended this result since federal law proscribes the placing of any qualifying words on the same label stating the net contents (15 U.S.C. §1453[a][2]). Thus, the label cannot read five

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* Section 1451 provides:

"Congressional declaration of policy.

Informed consumers are essential to the fair and efficient functioning of a free market company. *Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons.* Therefore, it is hereby declared to be the policy of the Congress to assist consumers and manufacturers in reaching these goals in the marketing of consumer goods." (Emphasis added)

po[illegible]s "when packed" (162a). Clearly, the intent of Congress was to require a statement of the weight the consumer could expect to receive at purchase.

In similar instances of coordinated federal and state programs, the courts have consistently refused to strike down state regulation. See, *N.Y. State Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 421 (1973); *Askew* v. *American Waterways Operators, Inc.,* 411 U.S. 325, 336 (1973); *Rice* v. *Chicago Board of Trade,* 331 U.S. 247, 255 (1947); *Chrysler Corp.* v. *Tofany,* 419 F. 2d 499, 510-511 (2d Cir., 1969). Nor will preemption be inferred merely from the comprehensive character of the federal scheme. *N.Y. State Dept. of Social Services* v. *Dublino, supra,* 413 U.S. at p. 415. "It would be a shocking thing, if state and federal governments acting together were prevented from achieving the end desired by both, simply because of the division of power between them.' Ribble [*State and National Power over Commerce* (1937)], 211." *Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408, 439 (1946), fn. 52. "For great reasons of policy and history not necessary to restate, these great powers were separated. They were not forbidden to cooperate. . . ." *Id.* Moreover, the language of the Fair Packaging and Labeling Act, discussed *infra,* is an express disclaimer of preemption and evidences instead a positive Congressional intent that federal and local efforts be coordinated (cf. *Rice* v. *Chicago Board of Trade, supra,* 331 U.S. at p. 255).

(4)

Since plaintiffs' proof shows that the City ordinance, as applied, is more stringent than the federal law, only in that the ordinance creates another time for inspection, we submit that the District Court correctly found that the local law was not preempted by, or in conflict with, federal law

(137a). Particularly with regard to possible conflict, the language of the Fair Packaging and Labeling Act, 15 U.S.C. at §1461, is determinative that more stringent local laws are deemed expressly not to be incompatible with the federal regulations.

That statute provides:

"Effect upon State Law

It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are *less stringent* than or require information different from the requirements of section 1453 of this title of regulations promulgated pursuant thereto." (Emphasis supplied)

The Senate Committee which reported the bill wrote, regarding §1461 and §1458 (which provides for "cooperation with state authorities") that (Senate Report, No. 1186, May 25, 1966, U.S. Code Congressional and Administrative News, 1966, Vol. 3, p. 4077):

"The bill is not intended to limit the authority of the States to establish such packaging and labeling standards as they deem necessary in response to State and local needs."

The Statement of the Managers on the Part of the House of Representatives explains that the "less stringent or different from" language contained in §1461 was from the House amendment. According to the Managers' Statement (*id.* at 4094):

"Language from the House report explaining these provisions is pertinent. It provides *that preemption would take place to the extent* that 'State laws or State regulations with respect to the labeling of net quantity of contents of packages impose *inconsistent or less stringent* requirements than are imposed under section 4 [§1453] of this legislation.' (Emphasis added)

These declarations hardly evince an intent by Congress to occupy the field so as to supersede local power with regard to labeling of food packages. To the contrary, the states are expressly permitted to take up the slack where they deem it necessary. Plaintiffs' position, namely, that more restrictive local laws are preempted by federal law, would sharply contract state power to solve local problems. The language of the federal law shows that Congress did not intend this result.

Although plaintiffs have here presented an elaborate technical argument in attempting to obtain freedom from local regulation, the "doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers." *DeVeau* v. *Braisted*, 363 U.S. 144, 152 (1959).

CONCLUSION

The orders appealed from should be affirmed, with costs.

November 15, 1974.

Respectfully submitted,

ADRIAN P. BURKE,
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566-3321 or 4337

L. KEVIN SHERIDAN,
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STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES BURNS

being duly sworn, says that on the 22 day of NOV

at No. 420-LEXINGTON-AVE in the Borough of MAN'H in New York City, he ser

of the annexed APPELLEE'S-BRIEF- upon William J. Condon

the Attorney for the PLAINTIFF-APPELLANTS in the within entitled action, by

a copy of the same to a person in charge of said Attorney's office, and leaving the same with him.

Sworn to before me, this 22nd
day of November 1974 } James Burns

Form 320-3M-123057(61)

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-55[illegible] Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

.....19 74

ved a copy

.....Esq.,

delivering